Tenaga Nasional Bhd v LTO Injection Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22NCVC-180–05 OF 2012
TEO SAY ENG JC
12 JULY 2013

Public Utilities — Electricity — Charges for electricity — Meter tampering or interference — Claim for loss of revenue because of tampering — Whether evidence adduced constituted prima facie evidence of payment that had to be made by defendant — Rebuttal evidence — Whether evidence in rebuttal created reasonable doubt of plaintiff's method of computation of electricity — Whether plaintiff's failure to amend its statement of claim as to period on which claim was based fatal — Counterclaim — Defamation — Whether plaintiff had defamed defendant by publication of notices of demand — Whether plaintiff protected by defence of justification — Electricity Supply Act 1990 ss 37(1), 38(3) & (4)

The plaintiff claimed that when it conducted a routine inspection of the electric meter which recorded the consumption of electricity at the defendant's factory premises in Masai, Johor ('the premises'), it had discovered that there had been meter tampering or interference. The plaintiff then carried out two tests that showed that there was a shortfall of -4.07% of the electricity consumed as a result of the tampering, which had resulted in a loss of revenue of RM290,489.29 for the plaintiff. Based on the results of the inspection carried out, the plaintiff issued two notices of demand against the defendant for payment of the RM290,489.29, being the unrecorded usage of electricity on the defendant's premises for the period 7 January 2008 to 1 June 2011. When the defendant failed to settle the sum claimed, the plaintiff filed an action against the defendant for recovery of the loss of revenue. The defendant denied all the plaintiff's allegations and averred that the method used by the plaintiff to record the tampering was crude and inaccurate. The defendant further submitted that even if there was tampering of the meter, the plaintiff had failed to prove the quantum of the loss claimed, ie RM290,489.29. The defendant counterclaimed for general and exemplary damages in the sum of RM200,000 on the grounds that the plaintiff had defamed it by the publication of the two notices of demand, which had allegedly accused it of meter tampering and theft of electricity. The plaintiff denied the statement of defence and counterclaim and submitted that it was protected from defamation by the defence of justification.

Held, dismissing the plaintiff's claim and the defendant's counterclaim with no order as to costs:

(1) The plaintiff had established that there was physical evidence of meter

tampering at the defendant's premises, which was sufficient to constitute an offence punishable under s 37(1) of the Electricity Supply Act 1990. Although there was no direct evidence that the tampering was done by the defendant or its staff, a reasonable inference could be drawn that the tampering was done by the defendant as the meter and installation were located within the defendant's premises where an outsider had no access and because the tampering would benefit only the defendant and not an outsider (see paras 23–24).

(2) As a general rule, the plaintiff had to prove its claim on the exact loss of revenue because of the tampering. However, the plaintiff could rely on s 38(4) of the Act to prove prima facie evidence of the payment that had to be made to recover the 'loss of revenue' pursuant to s 38(3) of the Act. In the present case, although the notice of demand issued by the plaintiff to the defendant had complied with the requirements of s 38(4) of the Act and thus constituted prima facie evidence of the payment that had to be made by the defendant, such prima facie evidence was not conclusive and could be rebutted by acceptable evidence to the contrary. The defendant adduced evidence that as the equipment used by the plaintiff to test the consumption of electricity was inaccurate and that the findings of that test were also inaccurate. The lack of an explanation from the plaintiff with regard to this allegation created a reasonable doubt as to its accuracy (see paras 27, 33–34).

(3) The defendant's attack on the reliability of the plaintiff's back billing document was also valid. The back billing document, which did not reflect that TNB had taken into account factors such as, inter alia, breakdown of machineries, stoppage for maintenance or repairs, holiday shut down and TNB supply interruption, was not reliable. As such, the computation of consumption of electricity based on the back billing method was questionable. In the circumstances, the prima facie evidence under s 38(4) of the Act had been rebutted by the defendant. However, although the rebuttal evidence adduced by the defendant had created reasonable doubt on the equipment used by the plaintiff and the method of computation of electricity it had not rebutted the plaintiff's finding that the meter and installation had been physically tampered with (see para 34 (III, IV)).

(4) Although it was the plaintiff's pleaded case that the computation carried out by the plaintiff was based on the test carried out by its staff, it was clear from the evidence adduced in court by the plaintiff that its computation on the amount due was based on history of usage, which was not pleaded. It was trite law that a party was bound by its pleadings and it was evident that the plaintiff's claim should fail on this ground alone. In the circumstances the plaintiff had failed to prove its claim on a balance of probabilities against the defendant (see paras 38–40 & 45).

(5) Alternatively, the plaintiff's claim should fail on the ground that although leave had been granted to allow the plaintiff, ie from '7 January 2008 to 11 August 2008' to '7 January 2008 to 1 June 2011', the amended statement of claim had not been filed. As the order granting leave had since lapsed, it followed that the plaintiff's whole claim was based on the period '7 January 2008 to 11 August 2008'. The back billing document clearly showed that there were no discrepancies on the usage of electricity from '7 January 2008 to 11 August 2008' (see para 46).

(6) The defendant's counterclaim that the plaintiff had defamed it had no merit. The plaintiff was protected by the defence of justification. Further, the defendant had also failed to adduce sufficient evidence to prove that the plaintiff had published the two notices of demand maliciously. In the event that the defendant had succeeded in proving that the impugned words in the notices of demand were defamatory, a global sum of RM150,000 was a reasonable award for both general and exemplary damages (see paras 53–55).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa semasa ia menjalankan pemeriksaan rutin ke atas meter elektrik yang merekodkan penggunaan elektrik di premis kilang defendan di Masai, Johor ('premis'), ia mendapati bahawa terdapat usikan atau gangguan pada meter tersebut. Plaintif kemudiannya menjalankan dua ujian yang menunjukkan kekurangan sebanyak -4.07 daripada elektrik yang digunakan akibat usikan tersebut, yang mana mengakibatkan kehilangan pendapatan sebanyak RM290,489.29 bagi plaintif. Berdasarkan keputusan pemeriksaan yang dijalankan, plaintif mengeluarkan dua notis tuntutan terhadap defendan bagi bayaran RM290,489.29, iaitu bagi penggunaan elektrik di premis defendan yang tidak direkodkan dalam tempoh 7 Januari hingga 1 Jun 2011. Apabila defendan gagal untuk menyelesaikan jumlah yang dituntut, plaintif memfailkan tindakan terhadap defendan bagi mendapatkan semula kerugian pendapatan. Defendan menafikan kesemua dakwaan plaintif dan menegaskan bahawa cara yang digunakan oleh plaintif untuk merekodkan usikan adalah ringkas dan tidak tepat. Defendan selanjutnya menghujahkan bahawa jika pun terdapat usikan pada meter, plaintif gagal untuk membuktikan kuantum bagi kerugian yang dituntut, iaitu RM290,489.29. Defendan menuntut balas bagi ganti rugi am dan teladan berjumlah RM200,000 atas alasan bahawa plaintif telah memfitnahnya dengan mengeluarkan dua notis tuntutan, yang didakwa menuduhnya mengusik meter dan mencuri elektrik. Plaintif menafikan penyataan pembelaan dan tuntutan balas dan menghujahkan bahawa ia dilindungi daripada fitnah oleh pembelaan justifikasi.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas defendan tanpa perintah terhadap kos.

(1) Plaintif telah membuktikan bahawa tiada keterangan fizikal bagi usikan

meter di premis defendan, yang mana cukup untuk membentuk satu kesalahan yang boleh dihukum di bawah s 37(1) Akta Bekalan Elektrik 1990. Walaupun tiada keterangan langsung bahawa usikan dilakukan oleh defendan atau kakitangannya, kesimpulan munasabah yang boleh dibuat adalah bahawa usikan dilakukan oleh defendan kerana meter dan pemasangannya terletak dalam lokasi premis defendan di mana orang luar tidak mempunyai akses dan kerana usikan hanya memberi faedah kepada defendan dan bukan orang luar (lihat perenggan 23–24).

(2) Sebagai satu peraturan am, plaintif mestilah membuktikan tuntutannya berdasarkan kerugian pendapatan tepat akibat usikan. Walau bagaimanapun, plaintif boleh bersandarkan pada s 38(4) Akta untuk membuktikan keterangan prima facie bayaran yang perlu dibuat untuk mendapatkan 'kehilangan pendapatan' di bawah s 38(3) Akta. Dalam kes ini, walaupun notis tuntutan yang dikeluarkan oleh plaintif kepada defendan mematuhi syarat-syarat s 38(4) Akta dan seterusnya membentuk keterangan prima facie bahawa bayaran yang perlu dibuat kepada defendan, keterangan prima facie tersebut tidak konklusif dan boleh disangkal oleh keterangan bertentangan yang boleh diterima. Defendan mengemukakan keterangan bahawa peralatan yang digunakan oleh plaintif untuk menguji penggunaan elektrik adalah tidak tepat dan bahawa dapatan ujian tersebut adalah juga tidak tepat. Ketiadaan penjelasan daripada plaintif mengenai dakwaan ini membangkitkan keraguan munasabah mengenai ketepatannya (lihat perenggan 27, 33–34).

(3) Cabaran defendan ke atas kebolehpercayaan dokumen pembilan undur tarikh juga sah. Dokumen pembilan undur tarikh, yang mana tidak menunjukkan bahawa TNB telah mengambil kira faktor seperti, antara lain, kerosakan mesin, pemberhentian bagi penyenggaraan atau pembaikan, penutupan kerana cuti dan bekalan TNB terputus, tidak boleh dipercayai. Dengan itu, pengiraan penggunaan eletrik berdasarkan cara pembilan undur tarikh adalah dipersoalkan. Dalam hal keadaan ini, keterangan prima facie di bawah s 38(4) Akta telah disangkal oleh defendan. Walau bagaimanapun, walaupun keterangan menyangkal yang dikemukakan oleh defendan telah membangkitkan keraguan munasabah mengenai peralatan yang digunakan oleh plaintif dan cara pengiraan elektrik, ia tidak menyangkal dapatan plaintif bahawa meter dan pemasangannya telah diusik secara fizikal (lihat perenggan 34 (III, IV)).

(4) Walaupun menjadi kes yang diplidkan oleh plaintif bahawa pengiraan yang dijalankan oleh plaintif adalah berdasarkan ujian yang dijalankan oleh kakitangannya, adalah jelas daripada keterangan yang dikemukakan di mahkamah oleh plaintif bahawa pengiraan jumlah yang terhutang adalah berdasarkan rekod penggunaan, yang mana tidak diplidkan.

Adalah undang-undang matan bahawa satu-satu pihak terikat dengan plidingnya dan adalah jelas bahawa tuntutan plaintif sewajarnya gagal atas dasar ini. Dalam hal keadaan ini, plaintif gagal membuktikan tuntutannya atas imbangan kebarangkalian terhadap defendan (lihat perenggan 38–40 & 45).

(5) Secara alternatifnya, tuntutan plaintif sewajarnya gagal atas alasan bahawa walaupun kebenaran telah diberikan untuk membenarkan plaintif, menukar '7 January 2008 to 11 August 2008' kepada '7 January 2008 to 1 June 2011', penyataan tuntutan terpinda tidak difailkan. Oleh kerana perintah memberi kebenaran telah luput, ini menjadikan keseluruhan tuntutan plaintif berdasarkan tempoh '7 January 2008 to 11 August 2008'. Dokumen pembilan kebelakangan menunjukkan tiada percanggahan dalam penggunaan elektrik daripada '7 January 2008 to 11 August 2008' (lihat perenggan 46).

(6) Tuntutan balas defendan bahawa plaintif telah memfitnahnya tidak bermerit. Plaintif dilindungi oleh pembelaan justifikasi. Seterusnya, defendan juga gagal untuk mengemukakan keterangan secukupnya untuk membuktikan bahawa plaintif telah mengeluarkan dua notis tuntutan tersebut dengan niat jahat. Dalam keadaan di mana defendan berjaya membuktikan bahawa perkataan-perkataan yang menjadi pertikaian dalam notis tuntutan adalah bersifat memfitnah, satu jumlah keseluruhan sebanyak RM150,000 adalah award munasabah bagi kedua-dua ganti rugi am dan teladan (lihat perenggan 53–55).]

Notes

For cases on charges for electricity, see 10 *Mallal's Digest* (4th Ed, Reissue) paras 2237–2240.

Cases referred to

MAE Sdn Bhd & Ors v Perwira Habib (M) Bhd, Kuala Trengganu [2000] 5 MLJ 204 (refd)

Taiwan Chief Precision Technology Sdn Bhd (formerly known as Li Yo Electronics Sdn Bhd) v Tenaga Nasional Bhd [2013] 4 MLJ 625, CA (refd)

Tenaga Nasional Bhd v Medicplas Industries Sdn Bhd (unreported), CA (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Legislation referred to

Companies Act 1965
Electricity Supply Act 1990 ss 37, 37(1), (3), (14), 38, (1), (3), (4), (5)
Licensee Supply Regulations 1990 reg 11(2)
Rules of Court 2012 O 20 r 9

Marliana bte Tagimin (Zainul Rijal Talha & Amir) for the plaintiff.
Ng Chew Hor (Ng, Fan & Associates) for the defendant.

Teo Say Eng JC:

THE PLAINTIFF'S CASE

[1] The plaintiff, the supplier of electricity is a public listed company incorporated under the Companies Act 1965.

[2] The defendant a private limited company is a registered consumer of the plaintiff having a consumer account No 0345-00697335-00 at premises No 4, Jalan Bukit 3, Kawasan Perindustrian Miel, Seri Alam, 81750 Masai Johor.

[3] The plaintiff's claim is premised on s 38 of the Electricity Supply Act 1990 ('ES Act') for loss of revenue amounting to RM290,489.29 arising from the tampering of the electricity meter on the defendant's factory premises.

FACTS OF THE CASE

[4] On 14 June 2011, the plaintiff through its staff had carried out an inspection at the defendant's factory and found that the electric meter and the electrical installation had been tampered with. The plaintiff carried out repairs and corrections on the said installations.

[5] From the tests carried out, the plaintiff discovered that the electricity meter failed to record the actual usage of electricity at the premises of the defendant's factory as a result of the tampering.

[6] The result of the tests carried out shows a short fall in the meter recordings of -4,07% as a result of the tampering. Based on the results of the said inspection, the plaintiff did the calculation and found that the amount of usage of electricity not recorded for the period between 7 January 2008 and 1 June 2011 was RM290,489.29.

[7] The plaintiff then sent a notice of demand dated 31 December 2012 through its solicitors Abdul Aziz Rahim & Co claiming for loss of revenue amounting to RM290,489.29 arising from the tampering of the electric meter

on the defendant's factory premises.

THE DEFENCE

[8] The main contentions of the defendant are:

(a) there was no tampering of the plaintiff's meter on the electrical installation;

(b) there is no proof that the meter did not correctly capture the electricity consumed:

(i) the plaintiff used the wrong instrument to carry out the tests;

(ii) the clamp meter has a margin of error of 1.5% to 5% which has not been noted in the *Borang Pemeriksaan P6*;

(iii) the method used by PW1 and his colleagues was crude and inaccurate by counting and expecting two persons to take the reading and to take the photographs using two cameras at exactly the same moment.

(c) even if on the assumption that there was tampering of the meter, the plaintiff had failed to prove the quantum of the loss claimed that is, RM290,489.29;

(d) since there was no conviction the plaintiff cannot succeed on any claim under s 38 of the ES Act;

(e) the failure of the defendant to amend the statement of claim in relation to the period of *'7 January 2008 hingga 11 August 2008'* to *'7 January 2008 hingga 1 June 2011'* meant that the plaintiff is bound by the original pleadings;

(f) The pleaded case of the plaintiff is not based on history of the usage but based on the results of inspection carried out by TNB. Therefore any evidence on computations based on history of usage should be rejected.

THE DEFENDANT'S COUNTERCLAIM

[9] The defendant claims that there was no proof of tampering or theft of any electricity by the defendant.

[10] The defendant submits that the letters dated 5 December 2011 and 31 January 2012 are clearly defamatory of the defendant as what was stated in the two letters meant:

(a) the defendant is dishonest;

(b) the defendant had done something dishonest and/or cheating;

(c) the defendant had carried out theft;

(d) the defendant had committed an offence against the law; and/or

(e) the defendant is a person who does not pay his debts; and

[11] the defendant is claiming general and exemplary damages for the sum of RM200,000 and costs and interest.

THE PLAINTIFF'S REPLY TO THE STATEMENT OF DEFENCE AND COUNTERCLAIM

[12] Basically, the plaintiff denies the statement of defence and counterclaim. The plaintiff pleads that it has evidence to prove that the electric meter and the electrical installation at the defendant's factory premises had been tampered with and the two notices dated 5 December 2011 and 31 January 2012 respectively are notices of demand for payment for loss of revenue arising from the tampering issued in pursuant to the Electricity Supply Act 1990. The plaintiff further pleads that the contents of both the notices are true and are in fact the results of the inspection of the electric meter and the electrical installation at the defendant's factory premises carried out by its staff, In the circumstances, the plaintiff is protected by the defence of justification.

ISSUE FOR DETERMINATION

Whether the electric meter in the factory premises of the defendant had been tampered with

[13] The plaintiff's claim for loss of revenue of RM290,489,29 is premised on s 38 of the ES Act.

s 38 of the Act provides:

(1) Where any person employed by a licensee finds upon any premises evidence which in his opinion provides that an offence has been committed under Section 37(1), 37(3) or 37(14), the licensee or any person duly authorised by the licensee may, upon giving not less than twenty-four hours notice, in such form as may be prescribed, cause the supply of electricity to the disconnected from the said premises.

(1A) …

(2) …

(2A) …

(3) The licensee may require the consumer to pay him for the loss of revenue

A due to the offence committed under Section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this Section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying:

B

(a) The amount of loss of revenue or the expenses incurred by the license; and

(b) The person liable for the payment thereof shall be prima facie evidence of the payment that has to be made by the consumer under

C subsection(3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment-such-amount shall be recoverable by civil in a Court.

D

[14] Under s 38(3) the plaintiff may require the consumer that is, the defendant to pay it for the loss of revenue due to the offence committed under s 37(1) that is the offence of tampering and any expenses incurred by the plaintiff under the section including the expenses incurred in respect of the

E reconnection of electricity supply.

[15] In order to require the defendant to pay for the loss of revenue the plaintiff must prove that the loss of revenue was due to the offence committed

F that is, the offence of tampering.

[16] The words 'offence committed' in s 38(1) has been interpreted by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 to mean the subjective finding of its employee if

G any offence has been found committed under s 37(1), (3) or (14) and does not mean there ought to be a finding of guilt and conviction under s 37(1) or (3) or (14) of the ES Act.

[17] It is now settled law that there is no necessity for a consumer to be

H convicted of an offence in ss 37(1), (3) or (14) before the TNB can recover loss of revenue due to the offence committed under ss 37(1), (3) or (14). However, there must be a subjective finding that an offence has been found committed under s 37(1), (3) or (14).

I **[18]** In the case before us, the court has to determine whether there was a subjective finding by the TNB staff that an offence of tampering had been committed. The word 'tampering' has been defined by *Collins Cobuild English Dictionary New Edition* to mean 'If someone' tampers with something, they interfere with it or try to change it when they have no right to do so'.

[19] Section 37 provides that any person who tampers with … any installation or part thereof … shall be guilty of an offence.

[20] The plaintiff has adduced the following evidence to establish the findings by the TNB staff that the offence of tampering had taken place at the defendant's factory premises on the date of inspection:

(a) PW1 has testified that:

(i) Semasa pemeriksaan dilakukan saya mendapati bahawa terdapat pengusikan pada pemasangan meter iaitu Sil Panel CT dan Terminal CT adalah palsu, rujukan di muka surat 22 Ikatan Dokumen Plaintif yang menunjukkan ia adalah palsu. Saya juga mendapati bahawa 1x wayar halus digunakan untuk memintas S1 & S2 di terminal CT pada ketiga-tiga fasa Red, Yellow & Blue menyebabkan meter tidak merekodkan bacaan yang betul — rujukan di muka surat 23 hingga 30 Ikatan Dokumen Plaintif.

(ii) Sil Terminal Meter yang asal mempunyai cop mohor TNB. Alat yang digunakan untuk memasang Sil Terminal Meter tersebut akan mewujudkan suatu tanda TNB pada Sil Meter tersebut. Alat yang digunakan tersebut hanya boleh didapati daripada TNB sahaja dan tidak boleh didapati di mana-mana kedai dan sil yang baru tiada cop tersebut.

(iii) Sil Terminal adalah palsu menunjukkan telah berlakunya pengusikan. Sil Terminal Meter adalah amat sensitive dan sekiranya cubaan untuk membukanya, ianya akan menimbulkan kesan yang senang untuk dikenal pasti.

[21] However the defendant has adduced evidence vide DW3, a director of the defendant company that the defendant or its staff did not at any time tamper with the plaintiff's meter or panel or other electrical installation or used a wire to bypass the connections in order to steal electricity from the plaintiffs supply. The defendant further argues that it is not logical for the defendant to have tampered with meter in its own factory premises in the manner alleged by the plaintiff as the false seals as admitted by PW1 would have been detected by any staff of the plaintiff. Despite the staff of the plaintiff having visited the defendant's factory 39 times between 10 August 2007 and 26 May 2011 the plaintiff did not detect any tampering.

[22] Therefore the plaintiff's pleaded case that the defendant had tampered with the meter and installations between 7 February 2008 and 1 June 2011 couid not be true as any tampering would have been seen by the naked eyes of those officers of the plaintiff.

[23] Having considered the evidence adduced by both the parties, I am

satisfied that the plaintiff had established through PW1 and his team that there was physical evidence that the electric meter and installation at the defendant's factory premises had been tampered with and that finding of the physical evidence of tampering is sufficient to constitute an offence punishable under s 37(1) of the Act.

[24] Although there was no direct evidence that the tampering was done by the defendant or its staff, a reasonable inference could be drawn that the tampering was done by the defendant or its staff for two reasons, first the meter and installation were located within the defendant's factory premises where outsider will usually have no access to the premises, secondly, the tampering would only benefit the user that is the defendant and no one else and it would be illogical and unreasonable for an outsider to come and tamper with a TNB meter which would not benefit them in any way.

[25] I am satisfied with the finding of PW1 of the physical tampering of the meter and the installation in the defendant's factory premises on the day of their inspection on 14 June 2011. I am of the considered view that the fact that the alleged tampering could have been detected easily and was not detected by the plaintiff during their visits prior 14 June 2011 will not cast any doubt on the finding of tampering by PW1 on 14 June 2011 unless there is evidence to show that PW1 and his team were acting maliciously against the defendant. From the evidence adduced, I find that SP1 and its team were merely carrying out their routine inspection of the meter at the defendant's factory. I do not have any reason to doubt what he and his team had testified in court regarding the findings of the physical evidence of the tampering of the meter in the absence of evidence to the contrary that they had malice or grudges against the defendant.

Whether the plaintiff had adduced prima facie evidence of the payment that has to be made by the defendant under s 38(3) and 38(4) of the ES Act

[26] 'Prima facie evidence' has been defined by *Sarkar onEvidence* at p 45 as 'evidence which if accepted appears to be sufficient to establish a fact unless rebutted by acceptable evidence to the contrary. It is not conclusive': See *Words, Phrases & Maxims — Legally & Judicially Defined 12P,* Q LexisNexis.

[27] As a general rule, the plaintiff must prove its claim on the exact loss of revenue because of the tampering. The claim cannot be based on proof of estimates. However the plaintiff may rely on s 38(4) to prove prima facie evidence of the payment that has to be made under s 38(3) of the ES Act upon the compliance of the requirements laid down in s 38(4) of the ES Act.

[28] To invoke s 38(4), I agree that the Act does not prescribe any form of

written statement. It can be in any written statement duly certified by the licensee or any person authorised by the licensee stating the amount of the loss of revenue and the person liable for the payment thereof (see the Court of Appeal decision in Civil Appeal No W-02(NCVC) 102–01 OF 2012 *Tenaga Nasional Bhd v Medicplas Industries Sdn Bhd*).

[29] The plaintiff has tendered a written statement that is, exh P12 duly certified by PW3 (Ramesh a/l Thangaveloo) an employee of TNB specifying the amount claimed that is RM290,489,00.

[30] The plaintiff has also issued a notice of demand dated 5 December 2011 requesting the defendant to pay up the amount claimed that is RM290.489.29 within 14 days from the date of the notice of demand and if the defendant failed to settle the amount due, the plaintiff will take legal action to recover the loss of revenue claimed and costs.

[31] Having construed the letter of demand dated 5 December 2011 issued by the plaintiff to the defendant (not disputed by the defendant) and the written statement exh P12, I am satisfied that the requirements under s 38(4) of the ES Act have been complied with.

[32] In the circumstances I find that the letter of demand together with P12 constitute prima facie evidence of the payment that has to be made by the defendant.

Whether the prima facie evidence under s 38(4) had been rebutted by the defendant

[33] The prima facie evidence established by the plaintiff is not conclusive and can be rebutted by acceptable evidence to the contrary (see *Sakar on Evidence* at p 45 and *Cross on Evidence* (2nd Ed) at p 24). The rebuttal evidence can take the form of evidence elicited from the plaintiffs witnesses or even evidence adduced by the defendant itself: Court of Appeal RS J-02(NCVC)-3148–12 of 2011 (*Taiwan Chief Precision Technology Sdn Bhd (formerly known as Li Yo Electronics Sdn Bhd) v Tenaga Nasional Bhd* [2013] 4 MLJ 625).

[34] The main attacks leveled against the plaintiff's prima facie evidence on the amount due that is RM290,489.29 are as follows:

(a) *Borang Pemeriksaan* P6 was not reliable:

(i) PW1 had carried out a test by clamp meter showing that there was a short fall of -4.07% of the electricity consumed as a result of tampering. However the Instruction Manual Digital Clamp Meter for model KEW 2003A tendered by the defendant through its

expert DW1 as exh D15 states that the said clamo meter had a marginal error of 1.5% to 5%. Yet PW1 failed to take into account the margin error of 1.5% to 5% of the clamp meter. The said margin error was not noted in the *Borang Pemeriksaan* P6.

(ii) The results obtained from the tests by SP1 as reflected in the *Borang Pemeriksaan* (P6) was wrong as the meter reading was higher than the CT reading. Since PW1 told the court that it was impossible for the meter reading to be higher than the busbar/CT reading, so the results obtained have cast doubts as to whether clamp meter used for the test was accurate.

(iii) DW1, an expert in the area of electricity, electrical engineering and related matters told the court that he had visited the defendant's factory and saw four plastic injection moulding machines and some auxiliary equipment such as air compressor, dryer and other-electrical loads. The electricity consumed by each machine fluctuated greatly from low to very high within a short period of time. He personally conducted the measurement. Given such large electricity fluctuations within a short period. DW1 is of the view that it can present difficulty in obtaining accurate meter readings. It is especially so if the measurements are done using slow acting instruments such as clamp meters. Moreover if the readings are obtained via human intervention it becomes error prone.

Ruling by court

I agree with the contention of the defendant that since there was no explanation forthcoming from PW1 on the above two allegations, couple with the opinion of DW1 that the use of the clamp meters in the measurement of the consumption of electricity by the four plastic injection moulding machines could present difficulty in obtaining accurate meter readings, I am doubtful whether the clamp meter used for the test was accurate.

(b) Back Billing Document P12

The defendant attacked the reliability of the back billing document — P12 on the following grounds:

(i) The back billing method of calculation does not take into account the results of inspection by the PW1 which shows a short fall -4.07% of the usage of electricity.

(ii) They had in their calculation used: a higher unit charge of RM0 -4.08% and a higher power factor (1.00 and 0.95). For instance (A) the power factor used by TNB in calculation of bill was 0.85 but P12 shows that plaintiff used a power factor of 1.00 and 0.95 instead of 0.85 in their calculation of the bills. (B) The plaintiff had used a

higher unit price to calculate the actual usage of electricity:

(A) As for the unit charges that is the unit price for each 'kwh' consumed, PW2 and PW3 said in their examination-in-chief that they had used the unit price/rate of tariff of 0.348 in their calculations. (see Q & A No 16 to PWS2 and Q & A No 16 to PWS3).

(B) This contradicted their own evidence in their examination-in-chief when they said the unit price/rate tariff of 0.372 was used. (see Q & A No 18 to PVVS2 and Q & A No 18 to PWS3).

(C) Be that as it may, if one looks at p 5 of Bundle B (P12), for example on 1 April 2009, the following can be deduced:

(I) Bil Serahan is RM27,096-10;

(II) KWH is 66,412-00

(III) Thus for one KWH, the price was:

RM27,096.100 = RM0-408

66,412-00

(IV) Jumlah Bil Sebenar is RM42,971-91;

(V) KWH is 105,523-32;

(VI) Thus for one KWH, the price was:

RM42,971-91 = RM0-408
105,323-32

(D) However, the actual applicable unit price for 1 April 2009 is shown on the bill sent to the defendant, at p 46 of Bundle C (D26) and the unit price was RM0.397 only and not RM0.408.

(E) This meant that the plaintiff had used a higher unit price in their computation.

(iii) Back billing does not reflect that TNB had taken into, account factors like breakdown of machineries, stoppage for maintenance or repairs, holiday shut down, TNB supply interruption, inconsistent orders affecting production capacity, product moulds change over etc.

(iv) Ruling by court

I agree with the submission of the defendant that the back billing document P12 was fraught with inconsistencies and contradictions. For the above reasons, I find that the *borang pemeriksaan* is not reliable and the computation of consumption of electricity based on back billing method is also questionable. I therefore find that the prima facie evidence under s 38(4) has been rebutted by the defendant.

However although the rebuttal evidence adduced has created reasonable doubt on the equipment used by TNB and the method of computation of electricity it has not rebutted the finding by PW1 that the meter and the installation had been physically tampered with.

THE ISSUE ON THE PLAINTIFF'S PLEADED CASE

[35] The defendant submits that the computation on the amount due and owing based on the history of usage should be rejected.

[36] The defendant points out that the *pleaded case of the plaintiff is not based on historical usage but based on the inspection and the results* of the inspection that there was a shortfall of -4.07% of the usage of electricity as a result of tampering. But the evidence adduced through PW2 and PW3 that their calculations had nothing to do with the tests on 14 June 2011 and the computations were based on the history of usage at p 7 of Bundle B. The defendant submits that the court cannot therefore displace the pleaded case and found that the defendant liable on a matter not pleaded. Furthermore p 7 of Bundle has not been marked as an exhibit and does not constitute evidence to be considered by the court.

[37] Since the method of calculation which was based on historical usage is not pleaded, that method should not be allowed to be relied upon in proving their claim against the defendant.

Ruling by court

[38] Having perused the statement of claim, I find it is indeed the pleaded case of the plaintiff that the computation carried out by the plaintiff was based on the test carried out by its staff.

[39] It is clear from the evidence adduced in court by the plaintiff that its computation on the amount due was based on history of usage.

[40] This is a clear departure from the method of computation pleaded in the statement of claim. I am of the considered view that the plaintiff's claim should fail on this ground alone.

[41] Even if the court were to accept the computation based on history of usage, I find that the computation which is based on a computer print out at p 7 of Bundle B which is not marked as an exhibit is also questionable and should be rejected.

Regulation11(2) Licensee Supply Regulations 1990

[42] The defendant submits that the plaintiff can only claim for a period of three months under reg 11(2) of the Licensee Supply Regulations 1990. I shall produce reg 11(2) of the Regulations 1990 below for convenience:

> Regulation 11(2) reads as follows:
>
> (2) The reading of the consumers meter shall be prima facie evidence of the amount of electricity consumed, provided that in the event a consumer has been undercharged or overcharged as a result of:
>
> (a) meter inaccuracy;
>
> (b) malfunctioning of the meter or its associated installation or part thereof;
>
> (c) incorrect meter reading;
>
> (d) incorrect application of a meter multiplying constant;
>
> (e) cross-connection of installation to different account; or
>
> (f) faulty installation.
>
> the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation:
>
> Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged.

Ruling by court

[43] Having perused the reg 11(2) I am of the view that such a contention is unsustainable since reg 11(2) of the Licensee Supply Regulations 1990 is not applicable to a case of meter tampering that is an offence under s 37(1) of the Electricity Supply Act and the claim for loss of revenue arising therefrom.

[44] It is clear that undercharging due to tampering does not fall under reg 11(2) of the Regulations 1990. The plaintiff's claim in this case which is premised on s 38 of the Electricity Supply Act for loss of revenue due to tampering is not limited to three months of back billing.

DECISION

[45] For the above reasons I find that the plaintiff has failed to prove its claim on the balance of probabilities against the defendant. I therefore dismiss the plaintiffs claim against the defendant.

[46] Alternatively, the plaintiff's claim should also fail on the ground that although leave has been granted to allow the plaintiff to amend its statement of claim on the period on which the whole claim was based that is, from '7 January 2008 to 11 August 2008' to '7 January 2008 to 1 June 2011' the amended statement of claim has not been filed. The order granting leave had therefore lapsed:

See *MAE Sdn Bhd & Ors v Perwira Habib (M) Bhd, Kuala Trengganu* [2000] 5 MLJ 204; O 20 r 9 of the Rules of Court 2012. That means to say that the whole claim is based on the period '7 January 2008 to 11 August 2008'. The back billing document P12 clearly shows that there were no discrepancies on the usage of electricity from '7 January 2008 to 11 August 2008' and this fact was not disputed by the plaintiff. Based on this ground alone the plaintiffs claim should fail.

COUNTERCLAIM

[47] The defendant submits that the plaintiff had defamed the defendant by the publication of two letters of demand dated 5 December 2011 exh D31 and 31 January 2012 exh D33 accusing the defendant of meter tampering and theft of electricity.

[48] Having read the contents of the two letters, I am of the considered view that the contents of the first letter dated 5 December 2011 exh D31 merely states the fact that the meter had been tampered with but did not accuse the defendant of tampering or theft of the electricity. I find that the letter D31 is a ietter of demand for payment of loss of revenue as a result of tampering of the meter.

[49] The notice of demand was issued for the recovery of the loss of revenue as a result of tampering in pursuant to s 38(5) of the ES Act. I therefore hold that its content are not defamatory.

[50] As regards the second letter that is the notice of demand dated 31 January 2012, I find that the second para of D33 had indeed accused the defendant of stealing the electricity resulting in the plaintiff losing the revenue. I shall produce the second paragraph below for convenience:

> Kami telah diarahkan oleh anak guam kami bahawa setelah siasatan dilakukan pada 14,6.2011 dan telah dibuktikan pihak tuan sebagai pengguna telah melakukan kesalahan kecurian arus dan akibat perbuatan kecurian arus yang telah dilakukan oleh pihak tuan tersebut maka pihak anak guam kami telah mengalami kerugian.

[51] I find that such accusation of theft if not proven is defamatory of the defendant and could tarnish the reputation and goodwill of the defendant.

[52] From the evidence adduced by the plaintiff, I find that the plaintiff had proved that the electric meter had been tampered with in the premises of the defendant's factory and a reasonable inference could be drawn that it was the defendant which committed the tampering for two reasons: one is that the meter was located within the defendant's factory premises which is under the care and control of the defendant and no one else; secondly the tampering of the meter would not benefit anyone except the defendant.

[53] Since the plaintiff had stated the truth or the substantial truth of tampering of the meter which had taken place in the defendant's factory premises, it is protected by the defence of justification as rightly pleaded in its reply to the statement of defence and counterclaim. Furthermore the defendant had also failed to adduce sufficient evidence to prove that the plaintiff had published D33 maliciously.

[54] For the above reasons, I find that the defendant had failed to prove its case on defamation and I therefore dismissed its counterclaim. I also order no cost to be paid by either party to the suit.

[55] For completeness on the claim for damages, on the assumption that the defendant had succeeded in proving that the impugned words in D33 were defamatory, having taken into account that the defendant being a private limited company, the mode and extent of the publication, the absence of any retraction or apology from the plaintiff, a global sum of RM150,000 is a reasonable award for both general and exemplary damages.

Plaintiff's claim and defendant's counterclaim dismissed with no order as to costs.

Reported by Kohila Nesan